Supreme Court, U.S.
FILED
JAN 2 3 2004
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No. 03-339

IN THE

Supreme Court of the United States

JOSE FRANCISCO SOSA,

Petitioner,

v.

HUMBERTO ALVAREZ-MACHAIN, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICUS CURIAE THE EUROPEAN COMMISSION IN SUPPORT OF NEITHER PARTY

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INTEREST OF *AMICUS CURIAE*

Amicus curiae the European Commission is the executive body of the European Community, a treaty-based international organization that has competence to develop and enforce Community-wide legislation in specified areas of policy.[1] The European Community is presently composed of fifteen Member States (Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden, and the United Kingdom). Ten new Member States (Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, and Slovenia) will join on May 1, 2004. Under the treaty framework, the European Community and its Member States are both entitled to express views and to legislate on issues of extraterritorial jurisdiction in relation to their respective competencies.[2]

The Treaty establishing the European Community reflects a commitment to the rule of law, including the rule of international law. It recognizes that the rule of law requires due respect for, and an effective regime for the

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[1] No counsel for any party authored this brief in whole or in part. No person or entity other than the *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation and submission of this brief. Petitioner has given blanket consent to the filing of *amicus* briefs. *Amicus* has obtained the written consent of Respondents to file this brief. The letters of consent are being filed separately.

[2] The European Community has taken a position on the extraterritorial effect of United States legislation on other occasions. *See, e.g.*, Council Regulation (EC) No. 2271/96, O.J. (L 309) 1 (Nov. 22, 1996) (adopted to counter extraterritorial effects of U.S. Cuban Liberty Solidarity Act and Iran and Libya Sanctions Act); *see also European Communities: Comments on the U.S. Regulations Concerning Trade with the U.S.S.R., reprinted in* 21 I.L.M. 891 (1982).

enforcement of, fundamental human rights recognized by international law.[3]

The European Commission takes the view that, in order to respect the authority of States and organizations, like the European Community, exercising their authority to regulate activities occurring on their own territory, and hence to preserve harmonious international relations, States must respect the limits imposed by international law on the authority of any individual State to apply its laws beyond its own territory.[4] For that reason, the European Commission has an interest whenever the United States adopts or applies laws that purport to govern or impose potential liability for conduct occurring beyond United States territory and that affect the areas of competence of the European Community.

United States courts have regularly applied the Alien Tort Statute 28 U.S.C. § 1350 to extraterritorial conduct. The statute is sometimes applied to reach conduct undertaken outside the United States by nationals of Member States of the European Community and legal entities organized under the laws of Member States of the European Community. Given that reach, *amicus curiae* the European Commission files this brief to urge this Court to interpret the statute, as a matter of both substantive standards and jurisdictional reach, in accord with the disciplined respect for the principles of international law that the statute incorporates.

[3] *E.g.*, Treaty Establishing the European Community, O.J. (C 325) (Dec. 24, 2002), arts. 177(2) & 181a(1); *see also* Treaty on the European Union, O.J. (C 325) (Dec. 24, 2002), arts. 6 & 11.

[4] *See Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* ¶ 5 (February 14, 2002) (Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal) ("One of the challenges of present-day international law is to provide for stability of international relations and effective international intercourse while at the same time guaranteeing respect for human rights. The difficult task that international law today faces is to provide that stability in international relations by a means other than the impunity of those responsible for major human rights violations.")

SUMMARY OF ARGUMENT

The European Commission does not support either party in this case. It also does not take a position on the question whether, in addition to conferring jurisdiction on federal courts, the Alien Tort Statute creates a cause of action for a tort in violation of the law of nations or a treaty of the United States. In the event the Court answers that question in the affirmative, the European Commission addresses the scope of the cause of action for a tort in violation of the law of nations.

Reflecting the respect of the founders of the United States for international law, this Court has insisted for at least two centuries, in accord with the principle first articulated in the *Charming Betsy* case, that "an act of congress ought never to be construed to violate the law of nations, if any other possible construction remains."[5] Consistent with that principle, the Alien Tort Statute should be interpreted by reference to the substantive and jurisdictional limits set forth by the law of nations.

The substantive standards imposed by the Alien Tort Statute should be defined by reference to international law. United States courts should rigorously apply international law to determine the conduct that gives rise to a violation of

[5] *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).

the law of nations. In doing so, courts should rely upon well established means for identifying customary international law and should recognize only causes of action based on truly international standards. Customary international law is evolutionary in nature, so the norms encompassed by the Alien Tort Statute will change over time. Accordingly, United States courts should be careful to assess conduct by reference to the international law that existed at the time the conduct took place.

United States courts should also rigorously apply international law to determine the actors who may be subject to liability for a tort in violation of the law of nations. In particular, courts should recognize that only a subset of norms that make up customary international law apply to non-state actors, such as corporations. In determining whether a non-state actor was complicit in a violation of customary international law by a state actor, courts should also apply international, rather than domestic, legal standards.

The subject matter of the statute should also be defined by reference to the United States's jurisdiction to prescribe under international law. Where the United States has jurisdiction to prescribe based on territoriality, nationality, or the protection of its security interests, the Alien Tort Statute may be interpreted to incorporate all torts in violation of the law of nations. However, when the United States does not have jurisdiction under one of the traditional bases, it may exercise jurisdiction to prescribe only in accordance with the principles governing universal jurisdiction.

International law sanctions universal criminal jurisdiction in order to end impunity for violations of the most fundamental norms of international law, such as the prohibitions against genocide, torture, war crimes, and crimes against humanity. However, the existence and scope

of universal civil jurisdiction are not well established. To the extent that universal civil jurisdiction is recognized, it applies only to a narrow category of cases. Any exercise of universal civil jurisdiction should also be limited in accord with its rationale. Hence, a State should exercise universal civil jurisdiction, where that exists under international law, only when the claimant would face a denial of justice in any State that could exercise jurisdiction on a traditional basis, such as territory or nationality.

Simply put, assuming that Congress intended to create a cause of action when it enacted the Alien Tort Statute, the European Commission respectfully suggests that Congress intended federal courts not to breach the law of nations but to rigorously apply it. This Court would honor that intent by defining the scope of the cause of action created by the statute to incorporate the substantive content and jurisdictional limits imposed by international law.

ARGUMENT

I. THE SUBSTANTIVE STANDARDS IMPOSED BY THE STATUTE SHOULD BE DEFINED BY REFERENCE TO INTERNATIONAL LAW.

What the founders of the United States generally referred to as the "law of nations" is now more commonly called international law.[6] Because the Alien Tort Statute expressly refers to torts committed, emphasis added, "in violation of the law of nations *or* a treaty of the United States," United States courts have interpreted the reference to the law of

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[6] *Restatement (Third) of the Foreign Relations Law of the United States* 41 (Introductory Note to pt. I, ch. 2) (1987) [hereinafter *Restatement (Third)*] ("law of nations" later referred to as "international law"); J.L. Brierly, THE LAW OF NATIONS 1 (1928).

nations as a reference to a body of international law that is not based on treaties – namely customary international law.[7]

Customary international law is established by general and consistent practice of States followed by them from a sense of legal obligation, or *opinio juris*.[8] It includes, but is not limited to, *jus cogens* norms, which are fundamental, peremptory norms that permit no derogation and prevail over any inconsistent international law.[9] Customary international law does not include state practice based on social or moral, rather than legal, obligations, because such practice lacks the requisite *opinio juris*.[10]

The works of scholars may assist to identify customary international law. As this Court has taught, however, judicial tribunals look to scholarly work "not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is."[11] In other words, courts look to these works in order to determine *lex lata* (what the law is) rather than *lex ferenda* (what the law ought to be).

A. United States Courts Must Rigorously Apply International Law to Determine the Conduct that May Give Rise to a Tort in Violation of the Law of Nations.

It follows from the definition of customary international law that, in determining the conduct that may give rise to a claim for a tort in violation of the law of nations under the Alien Tort Statute, United States courts must respect four basic principles.

First, to State a claim for a tort in violation of the law of nations, United States courts must require a plaintiff to allege conduct that would violate norms that qualify as customary international law under the well established means by which

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[7] *Flores v. Southern Peru Copper Corp.*, 343 F.3d 140, 143 (2d Cir. 2003). Another body of international law is comprised of "general principles of law recognized by civilized states," which form a source of international law, *see* Statute of the International Court of Justice, 59 Stat. 1055, June 26, 1945, art. 38(1)(c). United States courts, however, have not interpreted the Alien Tort Statute to authorize causes of action based on general principles.

[8] Statute of the International Court of Justice, *supra*, art. 38(1)(b) (identifying as source of international law "international custom, as evidence of a general practice accepted as law"); *North Sea Continental Shelf*, 1969 I.C.J. 4 ¶ 77; *Continental Shelf (Libya v. Malta)*, 1985 I.C.J. 13, 29; *Restatement (Third)*, *supra*, at § 102(2).

[9] Vienna Convention on the Law of Treaties, U.N. Doc. A/CONF 39/27, May 23, 1969, art. 53, *reprinted in* 8 I.L.M. 679 (1969); *Restatement (Third)*, *supra*, at § 102, cmt. k; *see also* Articles on Responsibility of States for Internationally Wrongful Acts, art. 26, adopted by the International Law Commission and noted by the General Assembly in 2001 (confirming widespread acceptance of *jus cogens*); James Crawford, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES 187 (2002).

[10] For an example of an examination of evidence of international law to determine whether a given norm had achieved the status of law, *see Flores*, 343 F.3d 140.

[11] *The Paquete Habana*, 175 U.S. 677, 700 (1900); *see also* J.L. Brierly, THE LAW OF NATIONS 41-42 (1928) ("No text-writer can create international law, but what he says may be valuable evidence of what the law is.").

such law is identified. For this reason, United States courts have held that allegations of conduct qualifying as torture, genocide, war crimes, summary execution, and arbitrary detention state claims under the statute,[12] but that claims based on norms that express aspirational goals rather than defined legal obligations, or that do not find sufficiently broad acceptance to qualify as customary international law, do not.[13] For example, the Court of Appeals for the Second Circuit recently held that the right to life and health were insufficiently definite to constitute rules of customary international law, and that there was insufficient evidence to establish a customary international law prohibiting intra-national pollution.[14]

Second, United States courts should bring within the statute only truly international standards – that is, standards that govern matters "of mutual, and not merely several, concern" of States.[15] For example, although murder may be universally proscribed by States in their domestic law, it should not provide a cause of action under the statute unless and until it reaches the level of international concern – in other words, unless it occurs in such circumstances or on such a scale that it would qualify as a war crime, a crime against humanity, or genocide.[16] For that reason, United States courts have regularly rejected claims based on domestic standards that do not involve matters of international concern.[17]

Third, because by definition customary international law evolves over time, United States courts must recognize that the norms encompassed by the Alien Tort Statute may also change over time. For example, at the time the statute was enacted, the principal offenses recognized under the law of nations were violations of the right of safe passage, infringements on the rights of ambassadors, and piracy.[18]

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[12] *Filartiga v. Pena-Irala*, 630 F.2d 876, 878 (2d Cir. 1980) (torture actionable); *see also Kadic v. Karadzic*, 70 F.3d 232, 241-44 (2d Cir. 1995), *cert. denied*, 518 U.S. 1004 (1996) (genocide, war crimes, summary execution, and torture actionable); *Doe I v. Islamic Salvation Front*, 993 F. Supp. 3, 8 (D.D.C. 1998) (war crimes actionable); *Mushikiwabo v. Barayagwiza*, 94 Civ. 3627, 1996 WL 164496 (S.D.N.Y. April 9, 1996) (torture and genocide actionable); *Xuncax v. Gramajo*, 886 F. Supp. 162, 184 (D. Mass. 1995) (summary execution and arbitrary detention actionable); *Forti v. Suarez-Mason*, 694 F. Supp. 707, 711 (N.D. Cal. 1988) ("*Forti II*") (causing disappearances actionable).

[13] *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161, 166-8 (5th Cir. 1999) (environmental torts and cultural genocide not actionable); *Aguinda v. Texaco, Inc.*, 1994 WL 142006, at *6-7 (S.D.N.Y. Apr. 11, 1994) (environmental torts not actionable); *Amlon Metals, Inc. v. FMC Corp.*, 775 F. Supp. 668, 670-1 (S.D.N.Y. 1991) (environmental torts not actionable).

[14] *Flores*, 343 F.3d at 160-2.

[15] *Filartiga*, 630 F.2d at 888.

[16] *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975) (though all states prohibit theft, law of nations does not incorporate that norm).

[17] *E.g.*, *Hamid v. Price Waterhouse*, 51 F.3d 1411, 1417-18 (9th Cir. 1995) (fraud, breach of fiduciary duty, and misappropriation of funds not actionable); *Cohen v. Hartman* 634 F.2d 318, 319-20 (5th Cir. 1981) (tortious conversion of funds not actionable); *Valanga v. Metropolitan Life Ins. Co.* 259 F. Supp. 324, 326-30 (E.D. Pa. 1966) (refusal to pay proceeds under insurance contract not actionable); *Damaskinos v. Societa Navigacion Interamericana* 255 F. Supp. 919, 923 (S.D.N.Y. 1966) (negligence and unseaworthiness of vessel not actionable).

[18] 4 William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 68 (1769); *see* William S. Dodge, *The Historical Origins of the Alien Tort Statute: A Response to the "Originalists,"* 19 HASTINGS INT'L & COMP. L. REV. 221 (1996); Joseph Modeste Sweeney, *A Tort in Violation of the Law of Nations*, 18 HASTINGS INT'L & COMP. L. REV. 445 (1995).

Today, by contrast, customary international law reaches a broader range of conduct.[19]

Finally, and conversely, the evolutionary nature of customary international law requires that United States courts exercise care in order to assess conduct by reference only to norms that had crystallized into law by the time of the conduct alleged. Because individuals, States, and other entities capable of incurring legal liability are entitled to make decisions about their conduct based on the legal standards prevailing at the time they act, courts may not judge yesterday's actions by today's standards. In other words, the problem of "inter-temporal law" is addressed under international law, as under other systems, by application of "the general principle that laws should not be applied retroactively."[20]

B. United States Courts Must Rigorously Apply International Law to Determine the Actors Who May Be Subject to Liability for a Tort in Violation of the Law of Nations.

Just as courts must apply international law to determine any cause of action created by the Alien Tort Statute, so, too, must they apply international law in order to determine the actors who may be subject to the norms reflected in

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19 *E.g.*, *Restatement (Third)*, *supra*, at § 702.

20 Peter Malanczuk, AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW 155 (7th ed. 1997); *see Western Sahara*, 1975 I.C.J. 12, 37-40 (Advisory Opinion); *Island of Palmas Arbitration*, Reports of International Arbitral Awards II, 829, 845 (1928) (Huber, J.) ("a juridical fact must be appreciated in light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled").

international law and hence to liability under the statute for a tort in violation of the law of nations.

First, only a subset of norms recognized as customary international law applies to non-state actors, such as corporations, and hence only that subset may form the basis of liability against such actors. For example, non-state actors may be liable for genocide, war crimes, and piracy,[21] while torture, summary execution, and prolonged arbitrary detention do not violate the law of nations unless they are committed by state officials or under color of law.[22]

Second, United States courts must also apply international law to determine the circumstances in which a non-state actor may be held liable for a violation of a standard not directly applicable to that actor on the ground that the non-state actor was complicit in a violation of that norm by state actors. For example, in *Doe I v. Unocal*, the Court of Appeals for the Ninth Circuit looked to case law from the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda to ascertain the appropriate standard under international law to apply to a claim that a defendant in an Alien Tort Statute case had aided and abetted the violation of

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21 *Restatement (Third)*, *supra*, at 71 (Introductory Note to pt. II).

22 *E.g.*, *Kadic*, 70 F.3d at 241-6 (torture and summary execution); *In re Estate of Ferdinand E. Marcos Human Rights Litig.*, 978 F.2d 493, 500 (9th Cir. 1992), *cert. denied*, 508 U.S. 972 (1993) (torture); *Xuncax*, 886 F. Supp. at 184-5 (torture, summary execution, disappearance, and arbitrary detention); *Forti II*, 694 F. Supp. at 711 (causing disappearances); *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1541-43 (N.D. Cal. 1987) ("*Forti I*") (torture, summary execution and prolonged arbitrary detention); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 794-5 (D.C. Cir. 1984) (Edwards, J., concurring), *cert. denied*, 470 U.S. 1003 (1985) (torture).

a norm within the scope of the statute but directly applicable only to state actors.[23]

II. THE SUBJECT MATTER OF THE STATUTE SHOULD BE DEFINED BY REFERENCE TO THE LIMITS SET FORTH BY INTERNATIONAL LAW ON THE UNITED STATES'S JURISDICTION TO PRESCRIBE.

The law of nations includes not only substantive norms but also limitations on the authority of States to apply their own law to conduct outside their own territory. In accord with the *Charming Betsy* principle,[24] this Court should construe the Alien Tort Statute to define the subject matter addressed by the statute to extend only so far as the United States's jurisdiction to prescribe under international law.[25]

[23] *Doe I v. Unocal*, Nos. 00-56603, 00-57197, 00-56628, 00-57195, 2002 WL 31063976, at *8-13 (9th Cir. Sept. 18, 2002), *reh'g en banc granted and opinion vacated*, 2003 WL 359787 (9th Cir. Feb. 14, 2003); *Prosecutor v. Naletilic and Martinovic*, IT-98-34-T, at ¶ 63 (March 31, 2003); *Prosecutor v. Furundzija*, IT-95-17/1-T, at ¶¶ 190-249 (Dec. 10, 1998), *reprinted in* 38 I.L.M. 317 (1999); *Prosecutor v. Tadic*, IT-94-1-T, at ¶¶ 688-692 (May 7, 1997); Rome Statute for the International Criminal Court, U.N. Doc. A/CONF.183/9, July 17, 1998, art. 25(3)(c), *reprinted in* 37 I.L.M. 999 (1998).

[24] *The Charming Betsy*, 6 U.S. (2 Cranch) at 118; *Restatement (Third)*, *supra*, at § 114.

[25] *See Kadic*, 70 F.3d at 240; *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 306 (S.D.N.Y. 2003); *Beanal v. Freeport-McMoran, Inc.*, 969 F. Supp. 362, 371 (E.D. Lou. 1997).

A. When Jurisdiction to Prescribe Is Based on Territory, Nationality, or Protection, the Alien Tort Statute May Be Interpreted to Incorporate the Full Body of the Law of Nations.

Jurisdiction to prescribe concerns the authority of States to apply their laws to certain activities, relations, and persons.[26] International law recognizes that States have jurisdiction to prescribe when there is a nexus between the conduct the State purports to regulate and the regulating State.

It is well established that States have jurisdiction to regulate conduct occurring on their territory (the territoriality principle); to regulate the conduct of their own nationals no matter where that conduct occurs (the nationality principle); and to regulate the conduct of non-nationals who are outside their territory when that conduct is directed against the security of the regulating State (the protective principle).[27]

Interpreting the statutory reference to torts in violation of the law of nations, United States courts have held that the statute reaches violations of "well-established, universally recognized norms of international law"[28] or "specific,

[26] *Restatement (Third)*, *supra*, at § 401.

[27] *Restatement (Third)*, *supra*, at § 402. The passive personality principle, by which States assert authority to exercise prescriptive jurisdiction based on the nationality of the victim, is irrelevant to the Alien Tort Statute because the statute permits claims only by aliens. As a practical matter, the effects doctrine, the validity of which as a matter of international law is subject to substantial controversy, would be unlikely to form the basis of an assertion of prescriptive jurisdiction over the conduct regulated by the Alien Tort Statute. Thus, this brief addresses neither of those asserted bases for prescriptive jurisdiction.

[28] *Filartiga*, 630 F.2d at 888.

universal and obligatory" norms.[29] To the extent these standards are applied to conduct on United States territory, by a United States national, or directed against United States's security interests, the statute falls within the United States's jurisdiction to prescribe under well established principles of international law. Hence, in interpreting the statute to reach such conduct, United States courts act in full accord with the *Charming Betsy* principle.

B. Where the United States's Jurisdiction to Prescribe Is Based on Universal Jurisdiction, the Alien Tort Statute Should Be Interpreted to Reach Only That Conduct Subject to Such Jurisdiction.

Universal jurisdiction permits States to exercise jurisdiction over matters of universal concern even when the State exercising jurisdiction has no connection with the case.[30] In the absence of a traditional basis for prescriptive jurisdiction, the Alien Tort Statute should not be read to reach claims based on all violations of the law of nations, but only such conduct as the United States would have authority to regulate under principles of universal jurisdiction.[31]

1. Principles of Universal Jurisdiction Authorize the Regulation Only of Specific Types of Conduct.

Modern international law recognizes two categories of conduct subject to universal criminal jurisdiction, which

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[29] *Hilao v Estate of Marcos*, 25 F.3d 1467, 1475 (9th Cir. 1994), *cert. denied*, 513 U.S. 1126 (1995).

[30] *Restatement (Third)*, *supra*, at § 404, cmt. a.

[31] *United States v. Yousef*, 327 F.3d 56, 103 (2d Cir. 2003) (universal jurisdiction encompasses only limited set of crimes that cannot be expanded judicially).

correspond to the two basic rationales justifying such jurisdiction.[32] The first category is made up of conduct so heinous – such as genocide – that every State has a legitimate interest in its suppression and punishment. As to these crimes, universal jurisdiction increases the prospect that heinous wrongdoers will be brought to justice.

The second category is made up of serious crimes – such as piracy, the crime that prompted the development of the principle of universal jurisdiction – whose perpetrators might be able to avoid the ordinary jurisdiction of states. As to these crimes, universal jurisdiction provides a means of calling the wrongdoer to account when a case could not be brought in states that might exercise jurisdiction on traditional bases.[33]

Although the existence of universal criminal jurisdiction is well established, its scope continues to develop under treaty and customary international law.[34] For example, although universal jurisdiction does not apply to all norms

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[32] Vaughan Lowe, *Jurisdiction*, *in* INTERNATIONAL LAW 329, 343 (Malcolm D. Evans (ed.) (2003)).

[33] Lowe, *supra*, at 343.

[34] *See generally* International Law Association, *Final Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offenses* 5-8 (2000) [hereinafter "I.L.A. Report"] (including genocide, crimes against humanity, war crimes and torture); *Restatement (Third)*, *supra*, at § 404 (including genocide, war crimes, piracy, slave trade, attacks on or hijacking of aircraft). Despite the authority normally carried by judgments of the Permanent Court of International Justice, its holding in *Lotus*, 1927 P.C.I.J., Ser. A, No. 10, at 19, that the exercise of criminal jurisdiction is permitted under international law unless affirmatively prohibited has been largely discredited. *See* Lowe, *supra*, at 335.

recognized under customary international law,[35] there is support under international law for universal jurisdiction over torture,[36] genocide,[37] war crimes,[38] and crimes against humanity.[39]

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[35] For example, systematic racial discrimination, such as apartheid, is widely condemned by states, but, at least at present, it does not give rise to universal jurisdiction because, among other reasons, the International Convention on the Suppression and Punishment of the Crime of Apartheid, G.A. Res. 3068, 28 U.N. GAOR, Supp. 30, U.N. Doc. A/9030 (1973), Article 5 of which allows persons charged with an apartheid crime to be tried by a competent tribunal of any State Party, has not been widely ratified. *See* Rosalyn Higgins, *International Law and the Avoidance, Containment and Resolution of Disputes*, 1991 RECUEIL DES COURS 9, 97; Christian Tomuschat, *Crimes Against Peace and the Security of Mankind in the Recalcitrant Third States*, *in* WAR CRIMES IN INTERNATIONAL LAW 41, 56 (Y. Dinstein and M. Tabory (eds.) 1996).

[36] Universal criminal jurisdiction is obligatory for states that are parties of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N.G.A. Res. 39/46, 39 U.N. GAOR Supp. (No. 51), U.N. Doc. A/39/51 (1984), arts. 5(2) and is permitted generally under customary international law, *see Prosecutor v. Furundzija*, IT-95-17/1-T, at ¶ 156 (Dec. 10, 1998), *reprinted in* 38 I.L.M. 317 (1999).

[37] Universal criminal jurisdiction is not provided by Article 6 of the Convention on the Prevention and Punishment of the Crime of Genocide 78 U.N.T.S. 277, December 9, 1948, but is accepted under customary international law. *Prosecutor v. Ntuyahaga* ICTR-90-40-T (Mar. 18, 1999); *Prosecutor v. Tadic*, IT-94-1-AR72, at ¶ 62 (Oct. 2, 1995). This rule is confirmed by state practice. *See, e.g., Attorney Gen'l of Israel v. Eichmann*, 36 ILR 277, 303-4 (Isr. S. Ct., 1962); *Demjanjuk v. Petrovsky*, 776 F.2d 571, 582-3 (6th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986); *Prosecutor v. Jorgic*, Bundesverfassungsgericht (German Federal Constitutional Court), 2 BvR 1290/99 (Decision of December 12, 2000), *reprinted in* Neue Juristische Wochenschrift 1848, 1852 (2001).

[38] Universal criminal jurisdiction is mandatory for states parties to the Geneva Conventions for grave breaches, including willful killing, torture or inhumane treatment and willfully causing great suffering. First

Universal civil jurisdiction has received less attention than universal criminal jurisdiction, and its existence and scope are not well established under international law.

The Restatement takes the position that universal jurisdiction may apply in the civil context, and the Report on Universal Jurisdiction of the International Law Association notes that the United States has exercised universal jurisdiction in the civil context "with some success."[40]

Geneva Convention, 75 U.N.T.S. 31, August 12, 1949, art. 49; Second Geneva Convention, 75 U.N.T.S. 85, August 12, 1949, art. 50; Third Geneva Convention, 75 U.N.T.S. 135, August 12, 1949, art. 129; and Fourth Geneva Convention, 75 U.N.T.S. 287, August 12, 1949, art. 146. These offenses are listed under Art 8(2)(a) of the Statute of the International Criminal Court, but the application of universal jurisdiction to the other war crimes listed in Art 8(2)(b) is not yet established.

[39] Universal criminal jurisdiction exists over crimes against humanity that were recognized in art. 6(2)(c) of the Nuremburg Charter of the International Military Tribunal, 8 U.N.T.S. 279, August 8, 1945, including murder, extermination, enslavement, deportation, and other inhumane acts. The application of universal jurisdiction to the new elements of the crime listed in Article 7 of the Statute of the International Criminal Court, including the crimes of apartheid and forcible transfer of populations, is not yet established.

[40] *Restatement (Third)*, *supra*, at § 404, cmt. b ("In general, jurisdiction on the basis of universal interests has been exercised in the form of criminal law, but international law does not preclude the application of non-criminal law on this basis, for example, by providing a remedy in tort or restitution for victims of piracy."); I.L.A. Report, *supra*, at 2-3; *see also* Robert Jennings & Arthur Watts, OPPENHEIM'S INTERNATIONAL LAW, 469-70 (9th ed. 1996) (citing *Filartiga* for proposition that serious violations of human rights, such as torture, are subject to universal jurisdiction). Some highly respected scholars have argued that international law imposes no limits on the exercise of civil jurisdiction by States. *See* Michael Akehurst, *Jurisdiction in International Law*, 46 BRIT. Y.B. INT'L L. 145, 177 (1972-73); Gerald Fitzmaurice, *The General Principles of International Law*, 92 RECUEIL DES COURS 1, 218 (1957). This view commands little modern support since it is based on

Similarly, the International Criminal Tribunal for the former Yugoslavia has recognized the possibility of victims bringing civil suits for damages in foreign courts.[41]

At the same time, while Judges Higgins, Kooijmans, and Buergenthal, in their Separate Opinion in the *Arrest Warrant* case in the International Court of Justice, saw in the Alien Tort Statute "the beginnings of a very broad form of extraterritorial jurisdiction" in the civil sphere, they also noted that the United States's assertion of such jurisdiction in that statute had "not attracted the approbation of States generally."[42] By the same token, while Article 14(1) of the Convention Against Torture provides that each state party shall ensure that torture victims have an "enforceable right to fair and adequate compensation," there is disagreement whether the Convention requires States to exercise universal jurisdiction or simply jurisdiction over torture committed on their territory.[43]

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the same discredited approach taken in the *Lotus* case. *See supra* n. 34; *see also* F.A. Mann, *The Doctrine of Jurisdiction in International Law*, 111 RECUEIL DES COURS 1, 73-81 (1964); F.A. Mann, *The Doctrine of Jurisdiction Revisited After Twenty Years*, 186 RECUEIL DES COURS 19, 20-33, 67-77 (1984).

[41] *Prosecutor v. Furundzija*, IT-95-17/1-T, at ¶ 155 (Dec. 10, 1998), *reprinted in* 38 I.L.M. 317 (1999).

[42] *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* ¶ 48 (February 14, 2002) (Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal).

[43] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *supra*, art. 14(1). While the United States, in adhering to the Convention Against Torture, expressed its understanding that the obligation to provide a civil remedy extended only to torture committed on its territory, *see* U.S. Reservations, Declarations, and Understandings, Convention Against Torture and Other Inhuman or

Finally, academic commentary on the existence and scope of universal civil jurisdiction is divided.[44]

International law is also unsettled as to the correspondence between the categories of conduct regulable as a matter of universal criminal jurisdiction and those regulable as a matter of universal civil jurisdiction. Several structural differences between civil and criminal jurisdiction counsel caution in recognizing universal civil jurisdiction.

Degrading Treatment or Punishment, Cong. Rec. S. 17486-01 (October 27, 1990); *see also* Curtis A. Bradley, *Universal Jurisdiction and U.S. Law*, 2001 U. CHI. LEGAL F. 323, 346, the text and the legislative history of the Torture Victims Protection Act of 1991, which implemented the Convention Against Torture as a matter of United States law, make it clear that that statute creates universal civil jurisdiction over torture. *See* Pub. L. No. 102-256, 106 Stat. 73 (Mar. 12, 1992); Torture Victim Protection Act of 1991, House Report No. 102-367 1, 4-5.

[44] *Compare, e.g.*, Beth Stephens, *Translating* Filartiga*: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations*, 27 YALE J. INT'L L. 1 (2002) (universal civil jurisdiction does and should exist); Beth Van Schaack, *In Defense of Civil Redress: The Domestic Enforcement of Human Rights Norms in the Context of the Proposed Hague Judgments Convention*, 42 HARV. INT'L L. J. 141 (2001) (same); *with, e.g.*, Bradley, *supra*, at 343-9 (not clear that universal jurisdiction applies to civil jurisdiction and application of universal jurisdiction to civil cases more problematic than criminal cases); M.O. Chibundu, *Making Customary International Law Through Municipal Adjudication: A Structural Inquiry*, 39 VA. J. INT'L L. 1069, 1130-4 (1999) (traditional justifications for universal jurisdiction inapposite to civil jurisdiction, but there may be arguments for reinterpreting doctrine). *See also* Special Rapporteur Theo van Boven, Economic and Social Council, *Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms* (1993), *reprinted in* 59 Law & Contemp. Prob. 283, 347 (1996) (states should maintain civil and criminal procedures with universal jurisdiction for human rights violations that constitute crimes under international law).

For example, States will generally exercise jurisdiction to try a defendant for crimes only when the defendant is within the State's custody, thereby limiting the scope of universal criminal jurisdiction, as well as the scope of civil actions attached to such jurisdiction.[45]

For another example, because in most States criminal prosecutions are initiated by and remain under the control of public authorities, criminal cases are subject to the plenary and unfettered discretion of public officials, who can take into account such considerations of public policy and international comity as they deem appropriate.[46] Thus, in deciding whether to bring or maintain a prosecution, public officials may consider whether another State is better equipped to exercise jurisdiction, or has a greater interest in

[45] *See, e.g., France,* Law No. 95-1 of January 2, 1995, art. 2, implementing Security Council Resolution 827 establishing the International Criminal Tribunal for the former Yugoslavia, *in* Official Journal of the French Republic 71; January 3, 1995; French Law No. 96-432 of May 22, 1996, art. 2, implementing Security Council Resolution 955 establishing the International Criminal Tribunal for Rwanda, *in* Official Journal of the French Republic 7695; May 23, 1996; Cour de Cassation, Decision of January 16, 998, 102 REVUE GENERALE DE DROIT INTERNATIONAL PUBLIC 825, 827 (1998) (suspect must be present for exercise of universal jurisdiction for genocide and crimes against humanity); *Netherlands,* Dutch Hoge Raad (Hoge Raad der Nederlanden), No. 749/01 (CW 2323) § 8.5 (September 18, 2001), *available at* <http://www.rechtspraak.nl> (exercise of jurisdiction over torture committed abroad requires presence of accused). *But see Germany*, Federal Code of Criminal Procedure, art. 153f (2), No. 3 and 4, as amended by art. 3, No. 5 of the Law introducing a Federal Code on Crimes against international law (Völkerstrafgesetzbuch) (June 26, 2002), *in* Federal Official Journal, Bundesgesetzblatt, pt. I, 2253, 2259 (jurisdiction may be exercised over suspects not present but prosecutors allowed to close investigation if suspect not present and no presence expected).

[46] Bradley, *supra*, at 347.

exercising jurisdiction, because the act occurred on its territory or involved its nationals as perpetrators.[47]

At the same time, other factors counsel in favor of recognizing universal civil jurisdiction for those offenses that come within universal criminal jurisdiction. Some legal systems permit the recovery of monetary compensation by the victim as part of the criminal prosecution of the wrongdoer.[48] In these systems, civil jurisdiction would

[47] *E.g., Belgium*, Code of Criminal Procedure, art. 12a, No. 4, as amended by the law of August 5, 2003 on grave violations of international humanitarian law, *in* Moniteur belge (Official Journal) (August 7, 2003), *available at* <http://www.just.fgov.be> (prosecutor will request magistrate investigate complaint unless interests of justice or international obligations require matter be brought before international tribunal or tribunal of another state, provided alternative tribunal competent, independent, impartial and fair); *Germany*, Federal Code of Criminal Procedure, art. 153f (2) No.4 (prosecutor may decide not to investigate if jurisdiction based on territoriality or nationality of victim or suspect exists elsewhere); *Spain,* Spanish Supreme Court, No. 327/2003 (February 25, 2003), *reprinted in* 42 I.L.M. 686, 698 (2003) (deference given to courts in place where act committed unless authorities of that state impede prosecution or directly participated in crime).

[48] An *action civile* is accepted and practiced in Austria, Belgium, Denmark, France, Luxembourg, the Netherlands, Portugal, and Sweden, and is possible in Finland, Germany, Greece, Italy, and Spain. Yves Donzallaz, *La convention de Lugano du 16 septembre 1998 concernant la compétence judiciaire et l'exécution des décisions en matire civile et commerciale,* Vol. III, No. 5203-5272 (1998); *see also* Council Regulation (EC) No. 44/2001, O.J. (L 12/1) (January 16, 2001), art. 5, No. 4, on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (civil claim for damages or restitution may be brought against person in Member State in which person not domiciled, provided that claim based on act giving rise to criminal proceedings and brought before court seized of those proceedings, to extent that court has jurisdiction under own law to entertain civil proceedings).

extend to the same category of cases as universal criminal jurisdiction, but it would also be subject to the same limitations, such as requiring the presence of the defendant before exercising jurisdiction.[49] While the recovery of damages in these systems is not fully comparable with universal civil jurisdiction, these systems demonstrate the difficulty in drawing strict distinctions between civil and criminal jurisdiction. They reflect, too, the broader point that criminal punishment and civil liability both operate, with different intensity, to vindicate important standards of conduct and deter future wrongdoing.[50]

Further, although the discretion of a national court to decline adjudication of a civil case may be more limited than that of public authorities to bring or maintain a criminal prosecution, there remain well established grounds on which national courts will decline to proceed in civil cases inappropriate for adjudication in the forum in which they are brought. For example, in the United States, particular facts and circumstances may require or permit a court to decline to proceed on grounds of lack of personal jurisdiction, *forum non conveniens*, or comity.

2. The Exercise of Universal Civil Jurisdiction Is Subject to Conditions that Comport With Its Justification.

If universal jurisdiction is justified by the international community's determination to end impunity for conduct that violates the most fundamental norms of international law, then the reach of that jurisdiction may properly be limited to conduct that would otherwise fall beyond effective sanction.

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[49] *See, supra,* n.45.

[50] Stephens, *supra*, at 51.

As a result, approaches to universal civil jurisdiction are emerging that favor the pursuit of remedies in States that may regulate the offensive conduct on traditional bases of jurisdiction.

A prime example is the Torture Victim Protection Act (TVPA), in which the United States Congress both implemented the Convention Against Torture and endorsed the prevailing interpretation of the Alien Tort Statute as a protection against other human rights abuses.[51] In the TVPA, Congress instructed United States courts to decline to proceed unless the claimant had exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred.[52] Congress imposed this requirement in order to strike a balance between, on the one hand, the need to provide redress for victims of flagrant human rights abuses, considering that judicial protection is often least effective in those countries where abuses are most common, and, on the other, the need to ensure that United States courts would not intrude upon cases that could be more appropriately handled by courts where the alleged torture or killing occurred, the need to avoid exposing United States courts to unnecessary burdens, and the need to encourage the development of meaningful remedies in other countries.[53]

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[51] Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (Mar. 12, 1992); House Report No 102-367 1, 3.

[52] Torture Victims Protection Act of 1991, *supra*, art. 2(b); *see Xuncax*, 886 F. Supp. at 179 (Art. 2(b) is not intended to create prohibitively stringent condition and not require exhaustion of unobtainable, ineffective, inadequate, or obviously futile remedies).

[53] Torture Victim Protection Act of 1991, House Report No. 102-367, at 1, 3-5.

The TVPA exhaustion requirement derives from a rule of general international law requiring that, before a claim may be asserted in an international forum, the claimant must have exhausted remedies in the domestic legal system.[54] This doctrine gives a State an opportunity to prevent, correct, or remedy conduct that would otherwise constitute a violation of international law. At the same time, to protect against a denial of justice and prevent wasteful resort to ineffective remedies, the doctrine excuses an attempt to exhaust when local redress is unavailable or obviously futile.[55] In similar fashion, an exercise of universal civil jurisdiction should be predicated on a showing that there was no reasonable prospect of redress in either a State exercising jurisdiction on a traditional basis or through an international mechanism.[56]

[54] The notion of exhaustion of local remedies was originally established in the area of diplomatic protection. *See Interhandel Case*, 1959 I.C.J. 6, 27 (Preliminary Objections) (local remedies rule well-established rule of customary international law); Ian Brownlie, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 472-81 (6th ed. 2003); Jennings & Watts, *supra*, at 522-6. It is also applied by international human rights bodies when determining the admissibility of individual applications.

[55] *Finnish Shipowners*, Reports of International Arbitral Awards III, 1484, 1535 (1934); *Norwegian Loans*, 1957 I.C.J. 39-40 (Separate Opinion of Judge Lauterpacht); *Velasquez Rodriguez v. Honduras*, Inter-Am. Ct.H.R., Ser. C, No. 4 (1989) (Merits), *reprinted in* 95 I.L.R., 259, 291, 304-9; *Restatement (Third)*, *supra*, at § 703, cmt. d, § 713, cmt. f.

[56] Human Rights Committee, International Law Association (British Branch), *Report on Civil Actions in the English Courts for Serious Human Rights Violations Abroad*, 2001 E.H.R.L.R. 129, 132. Support for a denial of justice rule in a civil law context also appears in the work of the Hague Conference on Private International Law on the proposed Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters. *See* art. 18 (3) of the preliminary Draft Convention adopted by the Special Commission of the Hague Conference on June 18,

The principle of complementarity reflected in the Rome Statute for the International Criminal Court imposes a similar rule of preference for local remedies. Under the Rome Statute, States that may exercise jurisdiction on the traditional bases are given the first opportunity to investigate and prosecute alleged offenders. If those States are unable or unwilling to proceed, however, a prosecution may be initiated in the International Criminal Court.[57] There is some support for the proposition that the same approach should be taken to the exercise of universal criminal jurisdiction.[58]

1991 but then revised in October 1999. In June 2001, the Nineteenth Diplomatic Session drew up a new version of this text that was not adopted. The drafts listed both accepted and prohibited bases of jurisdiction. Generally, a Contracting State would have to refuse to enforce a judgment rendered on a prohibited basis of jurisdiction, including where there was no substantial connection between the State that exercised jurisdiction and the facts of the case. However, art. 18 (3) provided an exception for States exercising jurisdiction over actions claiming damages for (a) genocide, crimes against humanity, and war crimes; and (b) certain other offenses where the party seeking relief would otherwise be exposed to the risk of a denial of justice because proceedings in another State were not possible or could not reasonably be required. Work on this Convention has effectively ceased. *See* <http://www.hcch.net/e/workprog/jdgm.html>.

[57] Rome Statute of the International Criminal Court, *supra*, Preamble (ICC complementary to national criminal jurisdictions); art. 17(1)(a), (b) (case generally inadmissible unless state with jurisdiction unwilling or unable genuinely to carry out investigation or prosecution).

[58] Universal criminal jurisdiction often involves a duty to extradite or prosecute suspects. *See, e.g.*, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *supra*, arts. 5(2), 7. This may require some deference to states exercising jurisdiction under traditional bases of jurisdiction. *See* Steven R. Ratner, *Belgium's War Crimes Statute: A Postmortem*, 97 AM. J. INT'L L. 888, 895 (2003) (priority to prosecute belongs to the state of territoriality if it is willing and able to do so); *The Princeton Principles on Universal Jurisdiction*,

Just as the content of the customary norms encompassed by the Alien Tort Statute must be interpreted in line with the evolution of international law, so, too, must the scope of their application take account of the unsettled state of the law relating to universal civil jurisdiction and of the emerging conditions and limitations of its exercise.

CONCLUSION

The European Commission respectfully requests this Court, if it holds that the Alien Tort Statute sets forth a cause of action, to define the cause of action by reference to the substantive content and jurisdictional limits of international law. The substantive content of the law of nations requires courts to adhere strictly to the rules for identifying customary international law, while exercising care to avoid retrospective application of newly developed norms. Courts should also recognize the exceptional conditions under which individuals and corporations may be held liable under international law.

Further, the Alien Tort Statute should be interpreted to comport with limits on the United States's jurisdiction to prescribe. Hence, the Alien Tort Statute should be interpreted to reach conduct with no nexus to the United States only where that exercise accords with principles governing universal jurisdiction. The existence and scope of universal civil jurisdiction are not well established. To the extent recognized, it should apply only to a narrow category

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Principle 8 (2001) (providing criteria for determining whether states should prosecute or extradite); *see also Case Concerning the Arrest Warrant of 11 April 2000, supra,* ¶ 59(3) (Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal) (state contemplating exercising universal jurisdiction must first offer national State of suspect opportunity to act).

of conduct and should be exercised only when the claimant would otherwise be subject to a denial of justice.

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Dated: Washington, D.C.
January 23, 2004